Supreme Court, U. S.
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In the Supreme Court of the United States

No. 75-1808

TATIANA DIAZ CALVO,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE STATE OF FLORIDA, COURT OF APPEALS, THIRD DISTRICT

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in the Supreme Court of the United States

NO. _____

TATIANA DIAZ CALVO,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE STATE OF FLORIDA, COURT OF APPEALS, THIRD DISTRICT

The Petitioner, TATIANA DIAZ CALVO, prays that this Court issue its Writ of Certiorari to the State of Florida, Court of Appeals, Third District, to review the judgment entered in this on May 13, 1975.

Petition for Rehearing was denied by the Florida District Court of Appeals, Third District, on June 4, 1975; timely Petition for Writ of Certiorari was filed in the Florida Supreme Court, which was denied on January 15, 1976; Timely Petition for Rehearing was denied on March 16, 1976.

CITATION TO OPINION BELOW

The opinion of the Florida District Court of Appeal, Third District, is reported at 313 So.2d 39 (3d DCA Fla. 1975). The opinion is set forth in its entirety in the Appendix hereto (A-1).

JURISDICTION

The opinion of the Florida District Court of Appeal, Third District, was rendered on May 13, 1975. The Florida District Court of Appeal, Third District, entered its Order Denying Petition for Rehearing on June 4, 1975.

The Florida Supreme Court entered its Order Denying Petition for Writ of Certiorari on January 15, 1976. The Florida Supreme Court entered its Order Denying Petition for Rehearing on March 16, 1976.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257 (3).

The decision on which review is sought was rendered by the Florida District Court of Appeal, Third District. All appellate remedies of the State Courts with respect to the constitutionality of the Dade County, Florida Grand Jury, have been exhausted as to the questions presented herein.

QUESTIONS PRESENTED

1. Whether a defendant in a criminal prosecution for murder and assault with intent to commit murder has been denied procedural and substantive due process of law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution, and compulsory service of process and the right to confront her accusers, guaranteed by the Sixth Amendment to the United States Constitution, where, having alleged and established that the grand jury which indicted her was improperly composed and was selected in an unconstitutional manner and was not drawn in a random manner from a true cross section of the community, she was denied access to the master grand jury list from which the grand jury was selected.

2. Whether a defendant has been denied her right to due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution, when her challenge to the selection process and composition of the grand jury which indicted her was ruled upon by a trial judge who oversaw the operation of said grand jury and participated in the selection of its members.

3. Whether Laws of Florida, Chapter 70-1000 (amending Chapter 57-550), which requires Circuit Court trial judges to select and supervise the grand jury, denied the defendant equal protection of the law and due process of law guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution, as written and as applied.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The following provisions and statutes are set forth in their entirety in the Appendix:

The Fifth Amendment to the United States Constitution (A-4).

The Sixth Amendment to the United States Constitution (A-4).

The Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution, (A-5).

Laws of Florida, Chapter 57-550, (A-5-11).

Laws of Florida, Chapter 70-1000, (A-11-13).

STATEMENT OF THE CASE

This was a criminal action commenced by the filing of a Grand Jury Indictment returned on October 16, 1973, by the 1973 Dade County, Florida Spring Term Grand Jury, against the Petitioner, charging her with the Second Degree Murder of her husband (Raul Calvo) and with Assault with Intent to Commit Murder in the First Degree upon one Yara Machado (A-14). On February 20, 1974, a Criminal Information based on precisely the same facts and testimony presented to the Dade County Grand Jury, was filed against the Petitioner charging her with Second Degree Murder and Assault with Intent to Commit Murder (A-17).

On October 29, 1973, the Petitioner filed a Motion to Dismiss Indictment and for an Evidentiary Hearing (A-20). On December 14, 1973, Petitioner filed an Amended Motion to Dismiss Indictment and for an Evidentiary Hearing (A-25). Said Motions alleged that the Grand Jury which indicted the Petitioner, was selected improperly and was not representative of the community from which it was drawn. The allegations were detailed and specific. Petitioner sought to prove her allegations by obtaining the Master Grand Jury List and requesting an evidentiary hearing.

The Trial Court denied all of the Petitioner's Motions relating to her attack on the 1973 Dade County Spring Term Grand Jury, without the benefit of an evidentiary hearing, despite Petitioner's providing evidence by way of depositions of various Court personnel of the *purposeful inclusion of a certain class of individuals* in the 1973 Spring Term, Dade County Grand Jury Panel.

Petitioner, after a Jury Trial, was found Guilty of Manslaughter and of Assault With Intent to Commit Murder in the First Degree and sentenced to concurrent ten year terms of imprisonment.

STATE APPELLATE ACTION

Petitioner filed her appeal in the State of Florida Court of Appeal, Third District. That Court held that scrutiny of the record and the briefs failed to demonstrate reversible error with reference to Petitioner's attack on (a) the failure of the trial court to grant her access to the Master Grand Jury list; the Court's refusal to issue subpoenas in order to depose persons on the list; and to grant

an evidentiary hearing on her grand jury challenge; and (b) the Constitutionality of Florida Statutes, Chapter 57-550 (A-5) and 70-1000 (A-11), Laws of Florida, in that they permit circuit court judges, acting as grand jury commissioners, to rule on the constitutionality of the selection of the members of the grand jury.

Petitioner thereafter filed a Petition for Rehearing, which was denied by the Florida District Court of Appeal, Third District, on June 4, 1975.

Petitioner then filed a Petition for Writ of Certiorari to the District Court of Appeal, in the Supreme Court of Florida, which Court denied said Petition by an Order dated January 15, 1976 (A-31). Petitioner's timely Petition for Rehearing was also denied by the Florida Supreme Court by an Order dated March 16, 1976 (A-33).

REASONS FOR GRANTING THE WRIT

The Trial Court sub judice denied all of the Petitioner's Motions challenging the Grand Jury which indicted her. The Florida District Court of Appeal, Third District, affirmed this action purportedly in reliance upon the previous rulings in *Seay v. State*, 286 So.2d 532 (Fla. 1974), cert. den. 419 U.S. 847, *Rojas v. State*, 288 So.2d 234 (Fla. 1973), cert. den. 419 U.S. 851; and *Dykman v State*, 294 So.2d 633 (Fla. 1973), *cert. den.* 419 U.S. 1105.

1. THE COURT BELOW HAS DECIDED A FEDERAL QUESTION OF SUBSTANCE IN A WAY PROBABLY NOT IN ACCORD WITH APPLICABLE DECISIONS OF THIS COURT.

In holding that there was no reversible error in denying Petitioner's repeated Motions and requests for access to the master grand jury list the Florida District Court of Appeal, Third District, has denied the petitioner constitutional rights to which she is entitled under the holding in *Test v. United States*, ____U.S.____, 95 S.Ct. 749 (1975). This Court therein held that

> . . . a litigant has essentially an *unqualified* right to inspect jury lists. It grants access in order to aid parties in the "preparation" of motions challenging jury selection procedures. Indeed, without inspection, a party almost invariably would be unable to determine whether he has a potentially meritorious jury challenge. [emphasis added].

Petitioner would agree with the position taken by the Florida District Court of Appeal, Third District, in its reliance on *Rojas v. State*, supra, and *Seay v. State*, supra, that the *mere assertion* that a jury panel was improperly drawn is not enough to warrant the opening of every grand jury panel to a full-scale investigation. However, petitioner would herein rely on the language of the Florida Supreme Court in the *Rojas v. State*, supra, at 237, wherein it was held that

> . . . one objecting to the composition of a jury panel must allege such discrimination as is here asserted by asserting *facts* to show the existence of the discrimination.
>
> * * *
>
> This does not, of course, require that the challenge *show* that the panel is improperly constituted; but what it *does* require is that the challenge assert

> *facts* that tend to raise a doubt as to whether the the panel *may* be improperly constituted. Then follows the inquiry to see if such suspicion, duly alleged, is supported by proof. [emphasis added]

By producing testimony through the depositions of various State and County Officials involved in the Grand Jury selection process and by other evidence, which testimony related with specificity the intentional inclusion of a certain class of individuals into the Grand Jury Pool in question — individuals between the ages of eighteen and twenty-one[1] — Petitioner presented adequate "facts" to the Trial Court and the Florida District Court of Appeal, Third District, to warrant a finding that Petitioner had been denied Due Process of the Law as guaranteed by the Fourteenth Amendment to the United States Constitution.

Further, to allow such a finding to be upheld would be to allow this Court's holding in *Cassell v. Texas*, 339 U.S. 282, 70 S.Ct. 629 (1950) to be so narrowly construed so as to have no effect where a jury panel is selected after the specific and intentional inclusion or exclusion of a certain class of individuals.

The action of the Florida District Court of Appeal, Third District, in this case cannot be constitutionally resolved with the decisions of this court in *Cassell v. Texas*, supra, and *Test v. United States*, supra. By denying Petitioner's request for production of the master jury list the Florida District Court of Appeal, Third District, achieved precisely the result sought to be avoided by *Cassell* and *Test*.

[1]The evil, of course, is an attempt or effort to systematically include (or exclude) certain classes or groups; the fact that the group here is one of *age*, as opposed to race or ethnic background is constitutionally immaterial.

The judgment of the court precluded Petitioner any opportunity to confirm whether or not he had a meritorious jury challenge. Even though the potential validity for such a challenge was preliminarily ascertained through the testimony of various State and County officials involved in the grand jury selection process, Petitioner contends there is a necessity for access to the official list in light of the Due Process requirements of the Fifth and Fourteenth Amendments to the United States Constitution, and by virtue of the Sixth Amendment's right to compulsory service of process and the right to confront one's accusers.

2. THE FEDERAL CONSTITUTIONAL QUESTION IS OF IMPORTANCE IN THE ADMINISTRATION OF JUSTICE.

If the question presented by this case has not already been answered by *Cassell* and *Test*, then it is a question which this Court should answer, because it is a recurring question of critical importance in the administration of critical importance in the administration of criminal law.

Does a defendant have an adequate opportunity to sustain an allegation of the improper impanelling of a grand jury where she is deprived of access to the master grand jury list and thereby unable to complete the proof of such allegation to a level deemed sufficient for the granting of any relevant motions?

Valid grand jury selection is a constitutionally protected right. One who has been indicted by an improperly selected grand jury is denied equal protection of the laws as guaranteed by the Fourteenth Amendment. *Reece v. Georgia*, 350 U.S. 85 (1955).

Further, in *Michel v. State of Louisiana*, 350 U.S. 91 (1955), this Court stressed that due process not only provides the right to object to a grand jury, but that right presupposes an opportunity to exercise that right. Here that opportunity was thwarted by the Petitioner's being denied all access to the evidence necessary to prove her challenge to the Grand Jury. In the case sub judice, Petitioner complied with the requirements laid down by the Florida Supreme Court in a prior case dealing with the same issues. See *Rojas v. State*, 288 So.2d 234 (Fla. 1973), cert. den. 419 U.S. 851. The Florida Supreme Court in *Rojas*, held that

> . . . one objecting to the composition of a jury panel must allege such discrimination as is here asserted by asserting *facts* to show the existence of the discrimination. Additional support may be found in United States v. Hoffa, 349 F.2d 20 (C.A. 6, 1965), and in Windom v. United States, 260 F.2d 384 (C.A. 10, 1958), both of which stand for the proposition that before a court will be required to permit a full-scale investigation of its jury panel, the panel must be *shown to be suspect.* This does not, of course, require that the challenge *show* that the panel is improperly constituted, but what it *does* require is that the challenge assert *facts* that tend to raise a doubt as to whether the panel *may* be improperly constituted. [emphasis added]

Although full complying with such requirements as laid down in *Rojas*, Petitioner was still denied access to the master grand jury list.

Thus, a highly suspect procedure, involving an issue of critical import in the administration of criminal justice, ise being utilized by the Courts of Florida; a procedure by which an individual is denied those crucial and fundamental rights which are guaranteed by the Due Process and Equal Protection Clauses of the Fifth and Fourteenth Amendments to the United States Constitution and by the Sixth Amendment right to compulsory process.

3. THE LAW CREATING THE DADE COUNTY GRAND JURY COMMISSION IS ITSELF VIOLATIVE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND SHOULD THEREFORE BE FOUND TO BE UNCONSTITUTIONAL ON ITS FACE AND/OR AS APPLIED.

The facts in the case instanter are clear and precise and as such provide a lucid vehicle by which this Honorable Court can determine the unconstitutionality of the law creating the Dade County Grand Jury Commission.

Laws of Florida, Chapter 57-550, as amended by Chapter 70-1000, requires the Dade County Circuit Court Judges to select the members of the grand jury and to oversee the operation of the grand jury. (A-12). However it was one of these same judges who, when faced with Petitioner's challenge to that action, ruled on the constitutionality of the laws, as written, and as applied. Petitioner was thus denied the right to a judge who was totally "neutral" on those matters upon which he must rule as guaranteed under due process of the Fourteenth Amendment. The actions of the Trial Court and the affirmance by the Florida District Court of Appeal, Third District, runs contrary to the well established requirement of judicial neutrality,

as a matter of due process of law. See: *Tummey v. State of Ohio*, 273 U.S. 510 (1927); *Coolidge v. New Hampshire*, 403 U.S. 443 (1971).

Further, the language of these laws, allow the Florida Courts to interpret them in such a fashion so as to uphold, as valid, the purposeful inclusion or exclusion of entire classes of individuals, and therefore they must be deemed unconstitutional on their face, or in the alternative, as applied by failing to comply with the intent of this Court as reflected by the holding in *Cassell v. Texas* supra.

The facts sub judice, as established by depositions and other unrebutted evidence in the record, show beyond any doubt that there was both opportunity for unconstitutional discriminatio nand actual systematic inclusion and exclusion in the grand jury process.

The issue, though not novel, is one which has not been accorded full appellate review by the Florida Supreme Court despite opportunity for same; thus, it is ripe for determination once and for all by the Court. The issue is one of major import to-the criminal justice system in Florida and especially Dade County, Florida, as numerous challenges to the constitutionality of the Dade County Grand Jury system are currently pending various tiers of the state and federal criminal court systems. This Court has granted similar relief on the ultimate question presented herein in cases such as *Peters v. Kiff*, 407 U.S. 493, 92 S.Ct. 2163 (1972); *Whitus v. Georgia*, 385 U.S. 545, 87 S.Ct. 643 (1967); and *Cassell v. Texas*, 339 U.S. 282, 70 S.Ct. 629 (1950).

CONCLUSION

The Petitioner has been denied basic fundamental rights guaranteed to her by the United States Constitution. She seeks relief in this Court to restore those rights to her. Based on the arguments and authorities cited herein, Petitioner, TATIANA DIAZ CALVO, respectfully requests this Honorable Court to grant a Petition for a Writ of Certiorari to the State of Florida, Court of Appeals Third District, reversing that Court's decision.

Respectfully Submitted,

HIRSCHHORN & FREEMAN, P.A.

By: _____

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petition for a Writ of Certiorari to the Supreme Court of the State of Florida, was mailed this 11th day of June, 1976, to the Attorney General of the State of Florida, 8585 Sunset Drive, South Miami, Florida 33143 and to the Honorable Sid J. White, Clerk of the Supreme Court of the State of Florida, Supreme Court Building, Tallahassee, Florida.

JOEL HIRSCHHORN

APPENDIX

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING PETITION
AND, IF FILED, IDSPOSED OF.

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
THIRD DISTRICT
JANUARY TERM, A.D. 1975

CASE NO. 74-1005

TATIANA DIAZ CALVO,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

Opinion filed May 13, 1975.

An Appeal from the Circuit Court for Dade County, Sidney Weaver, Judge.

Joel Hirschhorn, for appellant.

Robert L. Shevin, Attorney General, and Lance R. Stelzer and Elliott H. Scherker, Assistant Attorneys General, for appellee.

Before BARKDULL, C. J. and HENDRY, J. and CHARLES CARROLL (Ret.), Associate Judge.

PER CURIAM.

Appellant was found guilty by a jury of the crimes of manslaughter and assault with intent to commit first degree murder. She was sentenced to serve concurrent terms of imprisonment for ten (10) years.

As her first two points on appeal, appellant attacks (a) the failure of the trial court to grant her access to the master grand jury list; to issue subpoenas in order to depose persons on the list; and to grant an evidentiary hearing on her grand jury challenge; and (b) the constitutionality of Florida Statutes, Chapter 57-550 and 70-1000, Laws of Florida, in that they permit circuit court judges, acting as grand jury commissioners, to rule on the constitutionality of the selection of the members of the grand jury.

Our scrutiny of the record and the briefs fails to demonstrate reversible error under these two points. See, Seay v. State, Fla. 1974, 286 So.2d 532; Rojas v. State, Fla. 1974, 288 So.2d 234; Dykman v. State, Fla. 1973, 294 So.2d 633.

Next, appellant asserts that the court erred by failing to grant her motion for a judgment of acquittal upon one (or the other) of the two charges against her.

Closely connected to this point is the appellant's fourth point that the court charged the jury on two crimes which were inconsistent and incompatible; and, therefore, the charges were confusing.

Appellant was charged with second-degree murder of her husband, Raul Calvo, and assault with intent to commit first degree murder of one, Mrs. Yara Machado.

The evidence at trial indicated that it was the appellant's actual intent to kill Mrs. Machado, not her husband. However, the automobile in which she was driving only struck Mrs. Machado a glancing blow, while pinning the victim, Raul Calvo, against the wall of a building, resulting in his death.

Therefore, appellant argues that appellant's intent to kill Mrs. Machado is transferred to her husband, and it would be legally impossible for her to be guilty of second degree murder. Compare, Lee v. State, Fla. 1962, 141 So.2d 257; Pinder v. State, 1891, 27 Fla. 370, 8 So. 837; Coston v. State, 1939, 139 Fla. 250, 190 So. 520.

We find this reasoning lacking in substantial merit. In effect, appellant is arguing that the court should have instructed the jury that she could be found guilty of first degree, not second degree, murder of her husband.

Further, appellant contends that she was entitled to be acquitted because the state *undercharged* her for second degree murder, instead of first degree murder.

It is our conclusion that if any error was committed, the error benefitted the appellant, and, therefore, we hold it was harmless. Fla. Stat. § 924.33, F.S.A.

For the reasons stated, the judgment and sentence appealed are affirmed.

Affirmed.

AMENDMENT V

UNITED STATES CONSTITUTION

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jepoardy or life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI

UNITED STATES CONSTITUTION

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crimes shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

AMENDMENT XIV

UNITED STATES CONSTITUTION

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CHAPTER 57-550

SENATE BILL NO. 478

AN ACT to create a Grand Jury Commission in all counties in this state having a population of four hundred fifty thousand (450,000) or more, according to the last preceding federal census, and generally relating to the grand jury in such counties; and repealing Chapter 26,518, Acts of 1955, Laws of Florida, Chapter 28,468, Acts of 1953, Laws of Florida, and all laws in conflict with the provisions of this Act.

Be It Enacted by the Legislature of the State of Florida:

Section 1. The provisions of this act shall apply and relate to all counties in the State of Florida having a population of four hundred Fifty thousand (450,000), or more, according to the last preceding Federal census.

Section 2. There is hereby created a Grand Jury Commission composed of ten members as follows: the Clerk of the Circuit Court, Chairman of the Board of County Commissioners, County Supervisor of registration, Clerk of the Criminal Court of Record, and the County Judge having served for the longest, continuous term shall, each, be members of the Grand Jury Commission, and the five (5) remaining members of the Grand Jury Commission shall be appointed by the Governor, who shall appoint one (1) member from each County Commissioners' district. The term of office of each of the appointive Grand Jury Commissioners shall be four (4) years, and upon this act becoming a law the Governor of this state shall appoint three (3) Grand Jury Commissioners for a term of four (4) years and two (2) Grand Jury Commissioners for a term of two (2) years, and thereafter all appointive Grand Jury Commissioners shall be appointed for a term of four (4) years. There shall be a Chairman of the Grand Jury Commission to be elected by the members, and the Clerk of the Circuit Court shall be the Secretary.

Section 3. The Grand Jury Commission may employ such clerical assistants as may be necessary in order that it may function properly. The Board of County Commissioners of the County shall pay such assistants such sums as said Board my determine, and shall also furnish the Grand Jury Commission with such supplies and equipment as may be required in order to permit the proper functioning of the Grand Jury Commission. The compensation of such assistants, and the cost of such supplies and equipment, shall be paid out of the Fine and Forfeiture Fund of the County.

Section 4. The grand jurors in each County in this population classification shall be paid the sum of five dollars ($5.00) for each day when in session, or in court, or such sum as the general laws of the State of Florida may provide for the payment of grand jurors, whichever may be the greater. Such payment shall be made as now provided by law. That in addition to all other compensation provided by law, each grand juror shall receive the sum of five cents (5¢) per mile for every mile necessarily traveled in going from home to the courthouse, and return, when on official grand jury duty, whether attending Court, grand jury sessions or other grand jury meetings or business.

Section 5. The qualifications of persons to serve as grand jurors are as follows:

(a) Shall be a citizen of the United States of America, and a qualified elector and resident of the County.

(b) Shall be of sound mind, in possession of his, or her natural faculties and not infirm or decrepit.

(c) Shall not have been convicted of a felony or of a misdemeanor involving moral turpitude in any court within or without this state.

(d) Shall not have any pending criminal charges against him, or her, of a felony or of a misdemeanor involving moral turpitude in any court within or without this state.

(e) Shall be of good moral character, and shall be free of any present or past alliances, entanglements and associations with organized crime or with those associated therewith.

(f) Shall not be a member of any association or organization prohibited or declared to be subversive by the laws of the state of Florida or declared to be subversive by the Attorney General of the United States of America pursuant to law.

(g) Shall be intelligent, well informed and able to read and write the English language understandingly.

(h) Shall not be a public officer or employee of the United States of America, the State of Florida, or any county or city therein, but this prohibition shall not apply to any person serving without compensation, pursuant to the provisions of the United States Selective Training and Service Act, or any future draft law, nor to any person serving in the Militia or National Guard of this State.

(i) Attorneys-at-law shall not serve on the grand jury, and doctors of medicine, dentists and clergymen shall be excused upon request.

(j) Shall not have served on a grand jury in the County within a period of the last five (5) years.

Section 6. The Grand Jury Commission shall meet annually, on or before the first Monday in March of each year, and prepare a list of five hundred (500) names of persons qualified under the provisions of this act, and morally fit to serve as grand jurors, and shall file the

same with the Clerk of the Circuit Court; and the names of each of said persons shall be written upon a separate slip of paper and folded and placed, together with the list itself in a secure metal box to be known as the "GRAND JURY BOX", which shall be securely locked and sealed, and names of one or more of the Grand Jury Commissioners, together with the date, shall be written across the seal, and the box shall be delivered to the Clerk of the Circuit Court, who shall securely keep the same in a safe place, and the key thereto shall be kept by the Grand Jury Commission.

In preparing a list of names of prospective grand jurors, as provided by this act, the Grand Jury Commission shall make such investigation as it may deem necessary to determine the qualifications and moral fitness of persons to serve upon the Grand Jury. That upon the GRAND JURY BOX becoming depleted of names, the Grand Jury Commission shall immediately meet and refill the same, as provided by this act.

If the list of names of prospective grand jurors or the number of names of prospective grand jurors written on slips of paper and placed in the GRAND JURY BOX is more, or less than five hundred (500), it shall not affect the validity of the GRAND JURY BOX or any Grand Jury drawn therefrom.

Section 7. That the Grand Jury shall be drawn as provided by law; however, the members of the Grand Jury Commission shall be notified by the Clerk of the Circuit Court of the time and place of drawing the Grand Jury, and a majority of the members of the Grand Jury Commission shall appear at the drawing of the Grand Jury

and be present when the seal on the GRAND JURY BOX is broken and the box unlocked and when the Grand Jury is drawn, and thereafter the GRAND JURY BOX shall be locked and resealed by the Grand Jury Commissioners or so many thereof as are present. The Court shall draw from the GRAND JURY BOX a sufficient number of names as the Court determines to be necessary, not less than seventy-five (75), and summonses shall be sent by the Clerk of the Circuit Court to each prospective grand juror, by registered mail, return receipt requested, not less than thirty (30) days prior to the return date for their appearance in Court.

Section 8. This act shall not apply to the Grand Jury drawn for the spring term 1957 of the Circuit Court, but shall be applicable to the fall term 1957 thereof. That on or before September 15, 1957, the Grand Jury Commission shall meet and prepare a grand jury list and the GRAND JURY BOX, as provided by this act, and thereafter the Grand Jury for the fall term of Circuit Court 1957 shall be drawn, as provided herein.

Section 9. The Grand Jury shall be the official custodian of all of its records and all of the records of preceding grand juries, including stenographic notes and transcribed testimony of witnesses testifying before the Grand Jury, and all such records shall be kept in the official headquarters of the Grand Jury, provided, however, that the provisions of this act shall not apply to original indictments, presentments, reports, and similar Grand Jury instruments, documents and papers filed by the Grand Jury in Court or which are required by law to be filed before the Judge or with the Clerk of the Circuit Court. Upon

the empaneling of a new Grand Jury the preceding Grand Jury shall surrender all of the official Grand Jury Records to the newly empaneled Grand Jury.

Section 10. That Chapter 26,518, Acts of 1951, Laws of Florida, Chapter 30,225, Acts of 1955, Laws of Florida, and Chapter 28,468, Acts of 1953, Laws of Florida, be and the same are hereby repealed. That all laws and parts of laws in conflict with the provisions of this act be and the same are hereby repealed insofar as they affect the provisions of this act.

Section 11. That if any section, paragraph or other part of this act is declared invalid, or unconstitutional, it shall not affect the remainder thereof.

Section 12. This act shall take effect immediately upon its passage and approval by the Governor, or upon becoming a law without such approval.

Became a law without the Governor's approval.

Filed in Office Secretary of State May 21, 1957.

CHAPTER 70-1000

Senate Bill No. 1478

AN ACT relating to grand jury commissions; in all counties having a population in excess of four hundred fifty thousand (450,000), amending sections 1 and 2 of chapter 57-550, Laws of Florida, 1957; providing

that the grand jury commission be composed of the circuit judges of the judicial circuit encompassing the geographical area of the county; providing for a chairman and secretary; providing all laws and parts of laws in conflict herewith be repealed; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 1 of Chapter 57-550, Laws of Florida, 1957, is amended to read:

Section 1. The provisions of this act shall apply and relate to all counties in the State of Florida having a population of four hundred fifty thousand (450,000) or more, according to the last previous federal census.

Section 2. Section 2 of Chapter 57-550, Laws of Florida, 1957, is amended to read:

Section 2. There is hereby created a grand jury commission composed of the circuit judges of the judicial circuit encompassing the geographical boundaries of all counties referred to in section 1 of this act. The chairman of the grand jury commission, shall be elected by its members and the clerk of the circuit court shall be the secretary of the grand jury commission.

Section 3. All laws and parts of laws in conflict herewith are repealed.

Section 4. This act shall take effect September 1, 1970.

Vetoed by the Governor July 5, 1970.

Passed the Senate and House over the Veto October 9, 1970.

Filed in Office Secretary of State October 13, 1970.

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA IN AND FOR DADE COUNTY
SPRING TERM, 1973

73-6362

STATE OF FLORIDA
VS

TATIANA DIAZ CALVO
DEFENDANT.

INDICTMENT

I. SECOND DEGREE MURDER

II. ASSAULT WITH INTENT TO COMMIT MURDER IN THE FIRST DEGREE

[Filed October 17, 1973]

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF FLORIDA:

The Grand Jurors of the State of Florida duly called, impaneled and sworn to inquire and true presentment make in and for the body of the County of Dade, upon their oaths, present that on the 12th day of August, 1973, within the County of Dade, State of Florida, TATIANA DIAZ CALVO, by her act imminently dangerous to another and evincing a depraved mind, regardless of human life, al-

though without any premeditated design to effect the death of any particular individual, did kill and murder one RAUL CALVO by striking him with an automobile, a further and more particular description thereof being to the Grand Jurors unkown, contrary to Section 782.04 of the Florida Statutes, to the evil example of all others, in like cases of offending and against the peace and dignity of the State of Florida.

COUNT TWO

The Grand Jurors of the State of Florida, duly called, impaneled and sworn to inquire and true presentment make in and for the body of the County of Dade, upon their oaths, present that on the 12th day of August, 1973, within the County of Dade, State of Florida, TATIANA DIAZ CALVO did unlawfully and feloniously make an assault upon one YARA MACHADO with intent to commit a felony, to-wit: MURDER IN THE FIRST DEGREE as provided by 782.04 Florida Statutes, that is to say, the defendant, TATIANA DIAZ CALVO, did unlawfully and feloniously make an assault upon the said YARA MACHADO by striking her with an automobile with a premeditated design to effect the death of the said YARA MACHADO, a further and more particular description thereof being to the Grand Jurors unknown, contrary to Section 784.06 of the Florida Statutes, to the evil example of all others in like cases offending and against the peace and dignity of the State of Florida.

ANNE B. PEARSON
VICE-FOREWOMAN OF THE GRAND JURY

CIRCUIT COURT OF THE ELEVENTH
JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR DADE COUNTY

STATE OF FLORIDA
VS

TATIANA DIAZ CALVO
DEFENDANT.

INDICTMENT

I. SECOND DEGREE MURDER

I. SECOND DEGREE MURDER

II. ASSAULT WITH INTENT TO COMMIT MURDER IN THE FIRST DEGREE

A TRUE BILL

ANNE B. PEARSON
VICE-FOREMAN OF THE GRAND JURY

I HEREBY CERTIFY that I have advised the Grand Jury, as authorized by law, on the attached indictment.

RICHARD E. GERSTEIN,
State Attorney

Presented and filed in Open Court, in the presence of the Grand Jury, this 16th day of October, 1973.

RICHARD P. BRINKER
CLERK, CIRCUIT COURT

BY:
DEPUTY CLERK

[TITLE OMITTED]

INFORMATION FOR

I. SECOND DEGREE MURDER

II. ASSAULT WITH INTENT TO COMMIT MURDER

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF FLORIDA:

N. JOSEPH DURANT, JR. Acting State Attorney of the Eleventh Judicial Circuit of Florida, prosecuting for the State of Florida, in the County of Dade, under oath, information makes that TATIANA DIAZ CALVO on the 12th day of August, 1973, in the County and State aforesaid, by her act imminently dangerous to another and evincing a depraved mind, regardless of human life, although without any premeditated design to effect the death of any particular individual, did kill and murder one RAUL CALVO, by striking him with an automobile, thereby inflicting mortal wounds from which said mortal wounds he languished and died, a further and more particular description thereof being to the State Attorney unknown, in vio-

lation of Section 782.04 Florida Statutes, contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the State of Florida.

JPR:mcd
1/4/74
Bkd: 8/12/73 Jkt. No. 171699
Mag. No. 73-15102,03
Refile of Case No. 73-6462

COUNT TWO

AND N. JOSEPH DURANT, JR. Acting State Attorney of the Eleventh Judicial Circuit of Florida, prosecuting for the State of Florida, in the County of Dade, under oath, further information makes that TATIANA DIAZ CALVO on the 12th day of August, 1973, in the County and State aforesaid, did unlawfully and feloniously make an assault upon one YARA MACHADO with intent to commit a felony, to-wit: MURDER IN THE FIRST DEGREE as provided by 782.04 Florida Statutes, that is to say, the defendant TATIANA DIAZ CALVO did unlawfully and feloniously make an assault upon the said YARA MACHADO by striking her with an automobile with a premeditated design to effect the death of the said YARA MACHADO being in violation of 784.06 Florida Statutes,

[TITLE OMITTED]

INFORMATION FOR

I. SECOND DEGREE MURDER

II. ASSAULT WITH INTENT TO COMMIT MURDER

WITNESSES FOR THE STATE

Det. Scheeren
Miami Police Department
Homicide

contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the State of Florida.

STATE OF FLORIDA:
COUNTY OF DADE:

Personally appeared before me, N. JOSEPH DURANT, ACTING State Attorney of the Eleventh Judicial Circuit of Florida, who, being first duly sworn, says that the allegations set forth in the within Information are based upon facts that have been sworn to as true, and which facts, if true, would constitute the offense therein charged and that this prosecution is instituted in good faith.

PROSECUTION INSTITUTED IN GOOD FAITH AND SUBSCRIBED UNDER OATH

N. JOSEPH DURANT, JR.
ACTING State Attorney,
Eleventh Judicial Circuit
of Florida

Sworn to and subscribed before me this 7 day of JANUARY, 1974.

Richard P. Brinker, Clerk
Circuit Court of the Eleventh
Judicial Circuit of Florida,
in and for Dade County

(Circuit Court Seal)

By: _____ D.C.
MARY CATHERINE LOROW

[TITLE OMITTED]

MOTION TO DISMISS INDICTMENT AND FOR AN EVIDENTIARY HEARING

COMES NOW the Defendant, TATIANA DIAZ CALVO, by and through her undersigned attorney, and respectfully moves this Honorable Court to dismiss the Indictment herein and to declare Chapter 57-550 and Chapter 70-1000 of the Laws of the State of Florida unconstitutional and further for an evidentiary hearing; and as grounds therefor would show as follows:

1. The Indictment herein is insufficient as a matter of law.

2. The Indictment herein was returned by the Spring Term, 1973, Dade County Grand Jury, which was drawn from an improperly constituted jury pool. Said Grand Jury pool purposefully discriminated against the following classes of people in violation of the Fourteenth

Amendment to the United States Constitution: black persons; persons with incomes less than $8,000.00 per year, and low income persons generally; women; blue-collar workers; persons between the ages of eighteen, nineteen and twenty, and persons between the ages of twenty-one and thirty-four; persons over sixty years of age; persons with less than a twelfth-grade education; persons of Latin American descent; persons in the southern most part of Dade County, and the northern most part of Dade County; persons from "Inner City" and generally black "ghetto" areas; and persons who have registered to vote in Dade County within the last three months.

3. The method of selecting the names which constitute the Dade County Grand Jury pool as set forth in Chapter 57-550 and Chapter 70-1000, Laws of the State of Florida, violate the Fourteenth Amendment to the Constitution of the United States on its face and as applied to the Defendant in this cause: and further violate the Sixth Amendment to the United States Constitution.

4. The Grand Jury was drawn from a pool which systematically excluded members of the enfranchised groups referred to in paragraph two hereof, who had registered to vote in the State of Florida and County of Dade.

5. This challenge to the array and method of selecting the Dade County Grand Jury is brought pursuant to Florida Rule of Criminal Procedure 3.290, et seq., and Florida Statute 905.01, et seq., including but not limited to Florida Statute 905.03.

6. The Grand Jury, as previously drawn and constituted in Dade County, denies the Defendant the right to be brought to trial based upon an indictment voted by an impartial grand jury of his peers, and by a Grand Jury drawn from a pool truly representative of a cross-section of the community, as required by the Fourteenth Amendment to the United States Constitution and further said Grand Jury pool as constituted in Dade County is not a body truly representative of the community.

7. Chapter 57-550, Section 5, Laws of Florida, 1957, states and creates qualifications for persons to serve as grand jurors which are greater than the qualifications necessary to service as a petit juror under Florida Statute 40.01; and further as Section 5 is drawn, violates Defendant's right to equal protection of law and due process of law guaranteed by the Fourteenth Amendment to the United States Constitution in that said qualifications are vague, ambiguous, overbroad, incapable of being carried out, and further repose in the Dade County Grand Jury Commissioners an unlawful delegation of authority; and results in an unconstitutional conflict of interest, deprivation of the basic privileges and immunities granted to the Defendant, and violates the basic constitutional principle of checks and balances between the Judicial and Executive Branches of the State and Federal Government.

8. Chapter 70-1000 of the Laws of Florida purport to create by special legislation a Dade County Grand Jury Commission designed to result in a "blue ribbon" grand jury commission and a "blue ribbon" grand jury panel from which the instant grand jury was drawn;

moreover, Defendant adopts all allegations of paragraph seven as if set forth more fully herein in paragraph eight.

9. The Defendant further contends that she is entitled to an evidentiary hearing on the allegations of fact set forth herein, is entitled to take depositions of the Grand Jury Commission members, and is further entitled to examine the original master list of the Dade County Grand Jury, from which the said Grand Jury was drawn in order to show that said pool has been drawn and selected contrary to the Fourteenth Amendment.

10. Chapter 57-550 and Chapter 70-1000, Laws of Florida, are "special" legislation prohibited by the Florida Constitution.

11. Florida Statute 905.01 specifically states that "the grand jury shall consist of not less than fifteen persons nor more than eighteen persons." The instant Dade County Grand Jury consists of twenty-three persons; and therefore, is violative of the provisions of Florida Statute 905.01.

12. The Dade County Commissioners have not enacted an ordinance designed to create a grand jury commission composed of Circuit Judges, or an ordinance with respect to the qualification of grand jurors, nor has the Dade County Commission enacted an ordinance which states that it adopts Chapter 71-29, Section 3(2), Laws of Florida, Acts of 1971, or which states that Chapter 57-550, Laws of Florida, Acts of 1957, as amended by Chapter 70-1000, Laws of Florida, Acts of 1970, has been adopted and/or amended; nor has there been any proof of publication or affidavit attached to original House

Bill No. 932, the same being Chapter 71-29, Laws of Florida, Acts of 1971, on file in the office of the Secretary of State of the State of Florida.

13. The provisions of Chapter 57-550 create greater qualifications to serve as a grand juror than are created to serve as a petit juror and/or grand juror pursuant to the provisions of Florida Statute 40.01 and 40.07; and therefore, Chapter 57-550 is on its face unconstitutional.

WHEREFORE, the Defendant respectfully prays that this Honorable Court will dismiss the Indictment herein, and/or in the alternative declare Chapter 57-550 of the Laws of Florida, 1957, and Chapter 70-1000 of the Laws of Florida, 1970, unconstitutional; and in addition grant the Defendant an evidentiary hearing on the issues of fact herein.

Respectfully submitted,

JOEL HIRSCHHORN, P.A.
Attorney for Defendant
1040 City National Bank Building
25 West Flagler Street
Miami, Florida 33130

I HEREBY CERTIFY that a true and correct copy of the above and foregoing was mailed to the State Attorney's Office, 1351 Northwest 12th Street, Miami, Florida, this 29th day of October, 1973.

JOEL HIRSCHHORN, P.A.

[TITLE OMITTED]

AMENDED MOTION TO DISMISS INDICTMENT AND FOR AN EVIDENTIARY HEARING

COMES NOW the Defendant, TATIANA DIAZ CALVO, by and through her undersigned attorney, and respectfully files this her Amended Motion to Dismiss Indictment and Motion for an Evidentiary Hearing and moves this Honorable Court to dismiss the indictment herein and to declare Chapter 57-550 and Chapter 70-1000 of the Laws of the State of Florida unconstitutional and further for an evidentiary hearing on all issues of fact and as grounds therefor would show as follows:

1. The Indictment herein is insufficient as a matter of law.

2. The indictment herein was returned by the Spring Term, 1973 Dade County Grand Jury which by operation of the law was drawn from an improperly constituted jury panel. Upon information and belief, said Grand Jury Pool either purposefully or inadvertently discriminated against the following classes of people in violation of the Fourteenth Amendment to the United States Constitution: black persons; persons with incomes less than $8,000 per year, and low income persons generally; women; blue-collar workers; persons between the ages of eighteen, nineteen and twenty, and persons between the ages of twenty-one and thirty-four; persons over sixty years of age; persons with less than a twelfth-grade education; persons of Latin American decent; persons in the southern most part of Dade County, and the northern most part of Dade County; per-

sons from "inner city" and generally black "ghetto" areas; and persons who have registered to vote in Dade County within the last three months.

3. Upon information and belief, the method of selecting the names which constitute the Dade County Grand Jury Pool as set forth in Chapter 57-550 and Chapter 70-1000, Laws of the State of Florida, violate the Fourteenth Amendment to the Constitution of the United States on its face and as applied to the Defendant in this cause; and further violate the Sixth Amendment to the United States Constitution.

4. Upon information and belief, the Grand Jury was drawn from a pool which systematically excluded members of the enfranchised groups referred to in paragraph two hereof, who had registered to vote in the State of Florida and County of Dade.

5. This challenge to the array and method of selecting the Dade County Grand Jury is brought pursuant to Florida Rules of Criminal Procedure 3.290, et seq., and Florida Statute 905.01, et seq., included but not limited to Florida Statutes 905.03.

6. Upon information and belief, the Grand Jury, as previously drawn and constituted in Dade County, denies the Defendant the right to be brought to trial based upon an indictment voted by an impartial grand jury of his peers, and by a Grand Jury drawn from a pool truly representative of a cross-section of the community, as required by the Fourteenth Amendment to the United States Constitution; and further said Grand Jury pool as constituted in Dade County is not a body truly representative of the community.

7. Chapter 57-550, Section 5, Laws of Florida, 1957, states and creates qualifications for persons to serve as grand jurors which are greater than the qualifications necessary to serve as a petit juror under Florida Statute 40.01; and further, as Section 5 is drawn violates Defendant's right to equal protection of law and due process of law guaranteed by the Fourteenth Amendment to the United States Constitution in that said qualifications are vague, ambiguous, overbroad, incapable of being carried out, and further repose in the Dade County Grand Jury Commissioners an unlawful delegation of authority; and results in an unconstitutional conflict of interest, deprivation of the basic privileges and immunities granted to the Defendant, and violates the basic constitutional principle of checks and balances between the Judicial and Executive Branches of the State and Federal Government.

8. Upon information and belief, Chapter 70-1000 of the Laws of Florida purports to create by special legislation a Dade County Grand Jury Commission designed to result in a "blue ribbon" grand jury commission and a "blue ribbon"' grand jury panel from which the instant grand jury was drawn: moreover, Defendant adopts all allegations of paragraph seven as if set forth more fully herein in paragraph eight.

9. The Defendant further contends that she is entitled to an evidentiary hearing on the allegations of fact set forth herein, is entitled to take depositions of the Grand Jury Commission members, and is further entitled to examine the original master list of the Dade County Grand Jury, from which the said Grand Jury was drawn in order to show that said pool has been drawn and selected contrary to the Fourteenth Amendment.

10. Chapter 57-550 and Chapter 70-1000, Laws of Florida, are "special" legislation prohibited by the Florida Constitution.

11. Florida Statute 905.01 specifically states that "the grand jury shall consist of not less than fifteen persons nor more than eighteen persons." The instant Dade County Grand Jury consists of twenty-three persons; and therefore, is violative of the provisions of Florida Statute 905.01.

12. The Dade County Commissioners have not enacted an ordinance designed to create a grand jury commission composed of Circuit Judges, or an ordinance with respect to the qualification of grand jurors, nor has the Dade County Commission enacted an ordinance which states that it adopts Chapter 71-29, Section 3(2), Laws of Florida, Acts of 1971, or which states that Chapter 57-550, Laws of Florida, Acts of 1957, as amended by Chapter 70-1000, Laws of Florida, Acts of 1970, has been adopted and/or amended; nor has there been any proof of publication or affidavit attached to original House Bill No. 932, the same being Chapter 71-29, Laws of Florida, Acts of 1971, on file in the office of the Secretary of State of the State of Florida.

13. The provisions of Chapter 57-550 create greater qualifications to serve as a grand juror than are created to serve as a petit juror and/or grand juror pursuant to the provisions of Florida Statute 40.01 and 40.07; and therefore, Chapter 57-550 is on its face unconstitutional.

WHEREFORE, the Defendant respectfully prays that this Honorable Court will dismiss the Indictment

herein, and/or in the alternative declare Chapter 57-550 of the Laws of Florida, 1957, and Chapter 70-1000 of the Laws of Florida, 1970, unconstitutional; and in addition grant the Defendant an evidentiary hearing on the issues of fact herein.

Respectfully submitted,

JOEL HIRSCHHORN, P. A.
Attorney for Defendant
1040 City National Bank Building
25 West Flagler Street
Miami, Florida 33130

I HEREBY CERTIFY that a true and correct copy of the above and foregoing was mailed to the State Attorney's Office, 1351 Northwest 12th Street, Miami, Florida, this 14 day of December, 1973.

JOEL HIRSCHHORN, P. A.

[TITLE OMITTED]

AFFIDAVIT

STATE OF FLORIDA)
SS:
COUNTY OF DADE)

BEFORE ME, the undersigned authority, personally appeared JOEL HIRSCHHORN, who after being duly sworn upon oath, deposes and says that:

1. Your Affiant, JOEL HIRSCHHORN, is the attorney of record for Defendant TATIANA DIAZ CALVO.

2. That your Affiant believes those allegations of fact set forth in the attached Amended Motion to Dismiss are true except to those allegations of fact alleged upon information and belief, and as to those allegations Your Affiant believes same to be true.

3. This Affidavit is made in good faith and as required by the Florida Supreme Court in Rojas v. State, Florida Supreme Court Case No. 44,143 (December 5, 1973).

4. FURTHER AFFIANT SAITH NOT.

/s/

JOEL HIRSCHHORN

SWORN TO and SUBSCRIBED before me this 14 day of December, 1973.

/s/

Notary Public, State of Florida
At Large
My Commission Expires:

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Affidavit was mailed to the State Attorney's Office, 1351 Northwest 12th Street, Miami, Florida, this 14 day of December, 1973.

/s/

JOEL HIRSCHHORN, P. A.

SUPREME COURT OF FLORIDA
JANUARY TERM, A.D., 1976
THURSDAY, JANUARY 15, 1976

CASE NO. 47,589
DISTRICT COURT OF APPEAL
THIRD DISTRICT
74-1005

TATIANA DIAZ CALVO,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari, jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Florida Appellate Rule 4.5 c (6), and it appearing to the Court that it is without jurisdiction, it is ordered that the Petition for Writ of Certiorari be and the same is hereby denied.

ADKINS, C.J.; ROBERTS, BOYD, OVERTON and SUNDBERG, J.J., concur

A True Copy

TEST:

Sid J. White
Clerk Supreme Court.

TC
cc: Hon. William P. Carter, Clerk
Hon. Sidney Weaver, Judge
Hon. Richard P. Brinker, Clerk

Joel Hirschhorn, Esq.
Lance R. Stelzer, Esq.

EXHIBIT NO. 2

[TITLE OMITTED]

On consideration of the Petition for Rehearing filed by petitioner,

IT IS ORDERED that said petition is denied.

OVERTON, C.J., ROBERTS, ADKINS, BOYD AND SUNDBERG, JJ., CONCUR

A True Copy

TEST:

Sid J. White
Clerk Supreme Court.

By: Kay Oget
Deputy Clerk

Y

cc: Hon. W. P. Carter, Clerk
Hon. Richard Brinker, Clerk
Hon. Sidney Weaver, Judge
Hon. Joel Hirschhorn
Hon. Yale T. Freeman
Hon. Robert L. Shevin
Hon. Lance R. Stelzer
West Publishing Company

Supreme Court, U. S.
FILED
OCT 6 1976
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1976

NO. 75-1808

TATIANA DIAZ CALVO,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE DISTRICT COURT OF APPEAL OF
FLORIDA, THIRD DISTRICT

BRIEF OF RESPONDENT IN OPPOSITION

ROBERT L. SHEVIN
Attorney General
State of Florida

IRA N. LOEWY
Assistant Attorney General
Sunset Executive Center
8585 Sunset Drive, Suite 75
Miami, Florida 33143
(305) 279-8700

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OPINION BELOW

The opinion of the Florida District Court of Appeal, Third District, is reported at 313 So.2d 39 (3d D.C.A. Fla. 1975), and is attached to the petition for writ of certiorari as Appendix 1-3.

JURISDICTION

The jurisdictional requisites are set forth in the petition.

QUESTION PRESENTED

The respondent respectfully rephrases the petitioner's "Questions Presented" as follows:

> WHETHER A SUBSTANTIAL FEDERAL QUESTION IS PRESENTED BY THE OPINION BELOW HOLDING THAT THERE WAS NO VIOLATION OF PETITIONER'S CONSTITUTIONAL RIGHTS IN THE SUMMARY DENIAL OF PETITIONER'S MOTION ATTACKING HER GRAND JURY, WHERE THAT MOTION CONTAINED ONLY BARE ALLEGATIONS AND CONCLUSIONS DEVOID OF ANY FACTUAL ALLEGATION OR SUPPORTING PROOF.

STATEMENT OF THE CASE

The respondent accepts the petitioner's Statement of the case as correct, but deems the following additional facts to be relevant to this Court's decision on the question of jurisdiction:

Prior to trial, the petitioner filed a motion attacking the composition of the Grand Jury which had issued her indictment, as well as the selection procedure for the Grand Jury. The petitioner requested an evidentiary hearing on her Grand Jury challenge.

In order to support her motion, petitioner took the depositions of four State and County officials involved in the Grand Jury selection process. At a hearing held prior to trial, the Assistant State Attorney announced that the State was abandoning the Indictment and proceeding under the Information, which had been filed on February 20, 1974. (appendix 17-20). The trial court then denied the petitioner's motions relating to her attack on the 1973 Dade County Spring Term Grand Jury and ruled that prior defense motions filed would carry over to the Information. (appendix A-D). The record is devoid of any indication that the depositions were introduced into evidence or even presented to the trial court.

ARGUMENT

In the amended motion to dismiss her Indictment, the petitioner alleged that the Grand Jury which had indicted her was drawn from an improperly constituted jury pool. As grounds therefore, it was alleged that the Grand Jury Pool purposely discriminated against several classes of people specified as follows:

1. Black persons,
2. Persons with incomes less than $8,000 per year, and low-income persons generally,
3. Women,
4. Blue collar workers,
5. Persons between the ages of 18, 19 and 20,
6. Persons between the ages of 21 and 34,
7. Persons over 60 years of age,
8. Persons with less than a 12th grade education,
9. Persons of Latin American decent,
10. Persons in the southern most part of Dade County and the northern most part of Dade County,
11. Persons from the "inner city" and generally black "ghetto" areas,
12. Persons who have registered to vote in Dade County within the last three months.

No further specific allegations were made as to the basis for the alleged invalidity of these classifications and no underlying facts were alleged.

The petitioner did take the depositions of four State and County officials involved in the Grand Jury selection process, but these depositions were never placed into evidence, and the record does not show if they were shown to the trial judge prior to his denial of the petitioner's motion. The motion was denied at the same hearing where the State Attorney announced that the State was abandoning the Indictment and proceeding under the Information. The Florida District Court of Appeal, Third District, affirmed the trial court purportedly in reliance upon the previous rulings in Seay v. State, 286 So.2d 532 (Fla. 1974), cert. den. 419 U.S. 847; Rojas v. State, 288 So.2d 234 (Fla. 1973), cert. den. 419 U.S. 851; and Dykman v. State, 294 So.2d 633 (Fla. 1973); cert. den. 419 U.S. 1105.

The petitioner claims she was denied constitutional rights to which she was entitled under the holding in Test v. United States, ___U.S.___, 95 S.Ct. 749 (1975). However, the holding in Test v. United States, supra., was that a federal court litigant has an unqualified statutory right to inspect jury lists pursuant to section 1867(f) of the Jury Selection and Service Act, 28 U.S.C. §1861, et. seq. This Court did not hold that the unqualified right to inspect jury lists was a constitutional right, and there is no reason to conclude that this Court meant its decision to be controlling over the states. The law of Florida sets forth a

procedure identical to that held to be constitutional by the federal courts. Before a full scale investigation of the State's jury processes is warranted, it is incumbent on the petitioner to allege some factual basis from which it may be determined that the jury panel can be deemed to be suspect. Rojas v. State, supra.; Dykman v. State, supra.; United States v. Hoffa, 349 F.2d 20 (6th Cir. 1965); Windom v. United States, 260 F.2d 384 (10th Cir. 1958). Cf. United States v. Smaldone, 485 F.2d 1333 (10th Cir. 1973).

Under Florida law, grand jury records and proceedings are secret and may only be disclosed for certain limited purposes and under particularized circumstances. Gonzalez v. State, 220 So.2d 393 (Fla. DCA, 1969). Chapter 57-550, Laws of Florida, in Section 6 thereof provides that the names

> "...of each of said persons shall be written upon a separate slip of paper and folded and placed, together with the list itself in a secure metal box to be known as the "Grand Jury Box", which shall be securely locked and sealed and the names of one or more of the Grand Jury Commissioners, together with the date, shall be written across the seal, and the box shall be delivered to the Clerk of the

> Circuit Court, who shall securely keep the same in a safe place, and the key thereto shall be kept by the Grand Jury Commission."

The seal may be broken and the box opened only when the Grand Jury is drawn. Thereafter, the box must be again locked and resealed by the Grand Jury Commissioners. The obvious intent of the above legislation is that the names of those citizens placed upon the Grand Jury Master List and serving upon a particular Grand Jury shall remain a secret until the conclusion of their service. Accordingly, in seeking disclosure of such information provided by State law to be secret, the burden is on the accused to plead and prove, with the greatest accuracy and precision, the irregularities in the selection of the grand jurors which are claimed to have vitiated an indictment. State v. Demetree, 213 So.2d 709, 713 (Fla., 1968).

The petitioner claims she met this burden by taking the depositions of four State and County Officials involved in the Grand Jury selection process. This contention is a State evidentiary question and does not present a federal question of substance. In any case, these depositions were never introduced into evidence, and there is no indication they were even presented to the trial court. Since no evidence of any irregu-

larity in selecting the Grand Jury was presented to the trial court, denial of the petitioner's motion was mandated.

From its opinion, it is unclear if the Florida District Court of Appeal, Third District, considered the depositions. Respondent suggests that the Court did not consider the depositions, that it was bound by the State rule which prohibits the State appellate courts from considering exhibits which were never admitted into evidence or presented to the trial court. See: First National Bank in Fort Lauderdale v. Hunt, 244 So.2d 481 (4th DCA Fla. 1971); Watson v. Williams, 227 So.2d 226 (1st DCA Fla. 1969); Florida Livestock Board v. Hygrade Food Products Corp., 141 So. 2d 6 (1st DCA Fla. 1962).

Even if the depositions could have been considered by the Florida District Court of Appeal, it is still a state evidentiary question as to whether they contained facts sufficient to raise a doubt as to whether the panel may be improperly constituted.

For a petitioner to establish a constitutional violation of the type here attempted, he must first prove that the group allegedly excluded constitutes a distinguishable or cognizable class. In addition to the failure to allege any factual bases for petitioner's contentions as discussed above, there is the additional failure to specify any use of the

selection system by officials so as to intentionally or unintentionally result in an invalid array of jurors. Since federal courts faced with this issue have been reluctant to conclude the presence of constitutional violations in the absence of any allegations that the group excluded constitutes a distinct and separate class, the failure of the instant petitioner to so plead was a most serious omission.

A cognizable class for the purpose of jury challenges has been defined as one which has a definite composition, that is, which contains some factor which defined and limits the group. It is not one whose membership shifts from day to day or whose members can be arbitarily selected. The group must have cohesion as well as some basic similarity in attitudes or ideas or experience which is present in the members of the group and which can not be adequately presented if the group is excluded from the selection process. Thus, there must be a possibility that exclusion of the group will result in partiality or bias on the part of the juries hearing cases in which group members are involved. United States v. Guzman, 337 F. Supp. 140 (S.D.N.Y., 1972); affirmed 468 F.2d 1245 (2d Cir. 1972). Consequently, age as a measure of representation has been disfavored as a criterion for measuring the legality of jury selection. United States v.

v. DiTommasi, 405 F.2d 385 (4th Cir. 1968); United States v. Gooding, 473 F.2d 425 (5th Cir. 1973); State v. Silva, 259 So. 2d 153 (Fla. 1972). Similarly, a one year residence requirement for persons serving on federal, grand, and petit juries was held not to be an unconstitutional requirement in United States v. Perry, 480 F.2d 147 (5th Cir., 1973), where as a result no cognizable group was excluded.

Moreover, petitioner's allegations do not amount to a prima facie showing of systematic exclusion of necessary groups from her Grand Jury. It has been held that in order to make a prima facie showing of systematic exclusion from the grand jury petitioner would have the burden of proving first that the opportunity for discrimination existed by reason of the use of a biased source of potential jurors, and second that the use of such an infected source produced a significant disparity between the percentages in the source and the percentage on the grand jury panel. Wright v. Smith, 474 F.2d 349 F.2d 349 (5th Cir. 1973). Since there need not be proportional representation on the grand jury of each element of the population entitled to serve, Cassell v. Texas, 339 U.S. 282-287 (1950), it is necessary to establish a prima facie case. Alexander v. Louisiana, 405 U.S. 625, 629 (1972); Whitus v. Georgia, 385 U.S. 545, 552 (1967). Alexander requires that there

be an opportunity for discrimination in addition to a showing of steady under-representation of a cognizable class of citizens on the jury panels for an appreciable period of time.

The instant case raises the same issues as were presented to this Court in Seay v. Florida, 419 U.S. 847 (1974); Rojas v. Florida, 419 U.S. 851 (1975); and Dykman v. Florida, 419 U.S. 1105 (1975). In all three cases, this Court denied certiorari. Since the facts and issues are substantially similar, it is respectfully submitted that the instant case presents no better grounds for the issuance of a writ of certiorari. The petitioner's conclusary allegations foreclosed the possibility that the trial judge could ascertain whether there was any legal basis for petitioner's ultimate conclusions. In the absence of any legally sufficient factual allegation upon which petitioner might be able to establish a prima facie showing, the State courts were eminently correct in determining that an evidentiary hearing was not required.

Respondent also submits that no substantial federal question is presented by the fact that Laws of Florida, Chapter 57-550, as amended by Chapter 70-1000, appoints the Dade County Circuit Court Judges to the Dade County Grand Jury Commission. The petitioner claims, that by virtue of this law, the judge who ruled on her motion could not be totally neutral.

The petitioner has made no showing of actual prejudice or bias on the part of the trial judge and has never claimed that the trial judge was anything less than impartial. Petitioner made no motion to have an outside circuit judge, from beyond the circuit, assigned to the case. There is nothing in the record to show that the trial judge actually participated in choosing the members of the Grand Jury that indicted petitioner.

Under both federal and state law, grand juries have historically been considered an appendage of the courts. They not only relate to courts, but are inextricably bound up with them. Brown v. United States, 359 U.S. 41 (1959); United States v. Stevens, 510 F.2d 1101 (5th Cir. 1975); State v. Digman, 294 So.2d 325 (Fla. 1974). The quasi-judicial responsibilities imposed upon judges by Chapter 70-1000, Laws of Florida, in no way create a conflict of interest which would affect their neutrality. As stated by the Florida Supreme Court in Seay v. State, supra.

> We find Ch. 70-1000, Laws of Florida, to be constitutional per se and as applied in this case. The Legislature's determination to designate the circuit judges in larger counties to supply names of prospective grand jurors from which a panel is drawn, meets the requirements of reasonable-

ness, accuracy and fairness. The multiple number of circuit judges in such large circuits is calculated to reflect a fair cross section of the citizens and those who are well qualified to serve in this important assignment in their courts as grand jurors. Such judges are elected at large and are responsive to the electorate; they are knowledgeable with regard to the various sections of the circuit, its citizens and groups within the area which make up the community, by reason of the wide and varied contacts which they have over the circuit. The function of circuit judges in selecting grand jury names for consideration and service is a proper one and is not at odds or divergent to their duties as judges. They are, in fact, particularly suited to the task.

Id at 537.

Lastly, the respondent respectfully submits that the issue herein presented is moot. A criminal Information was filed against the petitioner on February 20, 1974 (appendix 17-20) and prior to trial the State abandoned the Indictment and proceeded under the Information. (appendix

A-D). This the State had a perfect right to do, inasmuch as the Grand Jury and the State Attorney have concurrent authority to file a formal accusation of the commission of a felony not involving capital punishment. State ex rel. Hardy v. Blount, 261 So.2d 172 (Fla. 1972); Gerstein v. Pugh, 420 U.S. 103, 95 S.Ct. 854 (1975). In the absence of evidence to the contrary, there is a presumption that public officals act properly in the performance of their duties Purdy v. Mulky, 228 So.2d 132 (3d DCA Fla. 1969); Alderman v. United States, 394 U.S. 165 (1969) and consequently, that the information was based upon the State Attorney's independent determination of probable cause.

Once the State elected to abandon the Indictment and proceed under the Information the petitioner's Grand Jury Challenge became moot. Even if the Indictment was ultimately held to be invalid due to an improperly impaneled Grand Jury this could not affect the validity of the Information, which was filed under the authority of the State Attorney.

The trial court did order that the pretrial motions of the petitioner would carry over to the Information. This included that portion of the petitioner's motion to dismiss which challenged the sufficiency of the Indictment and was not rendered moot when the State abandoned the Indictment. However, those portions of the motion which

challenged the Grand Jury itself were rendered moot and the respondent respectfully submits that this Court should deny certiorari. Henry v. Mississippi, 379 U.S. 443 (1965); North Carolina v. Rice, 404 U.S. 244 (1971).

CONCLUSION

Petitioner's failure to set forth any factual allegations to support her legal conclusions and her failure to place the depositions into evidence, deprived the Florida Third District Court of Appeal of any reasonable basis for concluding the instant Grand Jury was constitutionally suspect. That same deficiency renders insubstantial the federal question here presented. In addition, no case and controversy is presented, since the State's election to abandon the Indictment and proceed under the Information rendered the issue moot. It is respectfully submitted that this Court should deny jurisdiction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF RESPONDENT IN OPPOSITION was furnished by mail to the HONORABLE JOEL HIRSCHHORN, 1040 City National Bank Building, 25 West Flagler Street, Miami, Florida 33130, this ____ day of September, 1976.

IRA N. LOEWY
Assistant Attorney General

APPENDIX

APPENDIX A

MR. HIRSCHHORN: Mr. Raffle and I have a jury trial and I am in front of Judge Sepe.

THE COURT: The Court has decided to accept the information as filed; for the record, in connection with Calvo, Tatiana Calvo.

MR. HIRSCHHORN: We are then in this posture; the State has moved the Court to dismiss the indictment. The Court has granted the motion to dismiss the indictment.

MR. RAFFLE: I don't know if you granted that or not. I don't mind if you do.

THE COURT: I haven't granted that. I don't know if I have the jurisdiction to grant while it's on appeal.

MR. HIRSCHHORN: Nothing in this case is on appeal.

MR. RAFFLE: The question in some of the other cases--

THE COURT: This particular case is on appeal.

MR. RAFFLE: Judge Rowe deferred ruling. Most of those are first degree cases. This is a second degree. All we need is a trial date and then dismiss all of the indictments. I think that would make it.

APPENDIX B

THE COURT: And a plea by Mr. Hirschhorn as to this particular--

MR. HIRSCHHORN: I would like the order to be submitted. The State is doing what with the indictment? Abandoning it?

MR. RAFFLE: I am moving the Court to dismiss the indictment.

MR. HIRSCHHORN: The State has no jurisdiction to dismiss, move to dismiss the indictment. If it wanted to dismiss, the foreman of the Grand Jury ought to endorse a motion if, in fact, the State has authority and we say, under the rules, they have no authority.

MR. RAFFLE: In that thought I will abandon it and proceed under the information.

THE COURT: All right.

MR. HIRSCHHORN: And my answer to that, so the record is clear, the State cannot abandon something that is done by the Grand Jury. Only the Grand Jury can abandon it. The State Attorney's Office is merely--

THE COURT: Would you enter a plea then?

MR. HIRSCHHORN: The Defendant would decline to plea the information on the following grounds: First, we have the right to decline. We asked the Court to enter a plea and asked the Court to permit me to make as part of this record the five-page transcript of what occurred in this Court

on January 7, 1974, wherein the Calvo case came on for trial on the trial calendar on the indictment. At that time I reminded Judge Rowe, in the presence of Mr. Raffle, we were attacking the Grand Jury that returned the indictment.

I pointed out this was a six-month speedy trial and it's not Mr. Raffle's fault. The State took approximately three and a half months from the time of arrest and filing the indictment, and we have not delayed this at all. If it is necessary to get the Grand Jury I will waive speedies in this case.

The speedy trial does not expire until February 12th, February 8th.

*****

THE COURT: All right. We will load up May 6th.

This is a second degree murder?

MR. HIRSCHHORN: Yes, your Honor.

THE COURT: Abandon the indictment? Enter a plea inasmuch as the Defendant stands moot, enter not guilty, trial by jury and set trial for May 6th.

MR. HIRSCHHORN: Monday, May 6th.

THE COURT: That will go that Monday, commencing that Monday with a jury selection at 11:00 o'clock.

MR. HIRSCHHORN: Okay.

THE COURT: That is a definite date.

MR. HIRSCHHORN: One last thing. I assume all motions will carry over. If I need additional time, may I have additional time to file additional motions, if I decide to file any?

MR. RAFFLE: I don't object to any motions that have been filed carrying over to the information.

(R. 7-13).